

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

KENNETH ZAMVIL,

Plaintiff and Appellant,

v.

VALLEJO CITY UNIFIED SCHOOL  
DISTRICT et al.,

Defendants and Respondents.

A131359

(Solano County  
Super. Ct. No. FCS031398)

Kenneth Zamvil, employed by defendant Vallejo City Unified School District (School District) as a teacher with permanent and certificated status, was placed on unpaid involuntary leave pursuant to Education Code section 44940 based on findings of professional misconduct that included being charged with felony drug possession. Zamvil was subsequently dismissed after the School District's Commission on Professional Competence (Commission) sustained these findings following a full evidentiary hearing.<sup>1</sup>

Zamvil did not challenge the Commission's decision to dismiss him and the decision is now final. Instead, Zamvil brought this petition for writ of mandate and complaint for declaratory relief to compel the School District to award him back pay with prejudgment interest and appropriate retirement contributions for service credit from May 18, 2006, the date of his placement on involuntary leave, until December 18, 2008,

---

<sup>1</sup> Unless otherwise stated, all statutory citations herein are to the Education Code.

the date his employment was terminated.<sup>2</sup> In doing so, Zamvil reasons that he did not receive procedural due process prior to the School District's punitive decision to place him on unpaid compulsory leave (hereinafter, petition). Zamvil seeks in addition to monetary relief a judicial declaration of his procedural due process rights with respect to his suspension from service as a teacher.

The trial court denied the petition after finding Zamvil: (1) had an adequate remedy of law for seeking back pay and other monetary benefits in the form of a civil action against the School District (which he did in fact file and which is now the subject of a separate appeal), and (2) failed to submit a timely government claim pursuant to Government Code sections 905, subdivision (c) and 935, and to local policy 3320, subdivision (a) before filing the petition. Zamvil appeals. For reasons set forth below, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Zamvil was a permanent and certificated teacher assigned by the School District to teach in the independent study program at Hope School in August 2003. From the start, Zamvil exhibited a pattern of professional misconduct, including being late or absent multiple times without excuse, failing to properly grade students, and making improper and offensive remarks to students, teachers and colleagues.

On May 11, 2006, Zamvil was personally served with a Notice of Intention to Dismiss and Statement of Charges stating that he would be terminated unless he filed a written request for hearing within 30 days. Among those reasons identified in the 9-page Statement of Charges for seeking dismissal were: over a dozen failures to report to duty or to timely report to duty, inappropriate and excessive personal cell phone use, repeated failures to submit student report cards and other mandatory forms, sleeping on duty, and

---

<sup>2</sup> Also named below as a petitioner was the California Teachers' Association (CTA). The CTA is not named as a party on appeal. Also named as both a defendant and respondent is Richard Damelio in his official capacity as state administrator of the School District.

numerous instances of making derogatory and inappropriate comments (including of a sexual or hostile nature) to students, teachers and colleagues.

Zamvil timely requested a hearing on or about June 9, 2006. However, before this occurred, on May 18, 2006, Zamvil was served with another letter stating that he was being placed on compulsory leave pursuant to section 44940, effective immediately, based on a felony criminal complaint filed in Sonoma County Superior Court charging him with drug possession (Health & Safety Code section 11377) and resisting arrest (Penal Code section 148). The School District discovered these criminal charges against Zamvil when investigating the charges of misconduct set forth in the May 11, 2006 letter. In addition, the School District discovered upon further investigation that at least seven of Zamvil's absences during years 2005 and 2006 were due to mandatory court appearances stemming from the criminal charges not, as he had reported, due to illness or jury duty. Among other things, the letter informed Zamvil that he would continue to be paid his regular salary only if he provided the School District with a bond or other suitable security to guarantee the money would be repaid if Zamvil was later convicted of the charges or failed or refused to return to service after acquittal or dismissal of the charges. This requirement and other relevant procedures were set forth in sections 44940 and 44940.5, copies of which were provided to Zamvil with the letter.

On March 7, 2007, Zamvil pleaded guilty to violating Health & Safety Code section 11377, subdivision (a) and, on July 31, 2007, the School District filed an Amended Accusation with the Commission to include information relating to his guilty plea and dishonesty in missing work for mandatory court appearances. Zamvil then entered a deferred entry of judgment program pursuant to Penal Code section 1000 et seq. Upon successful completion of this program, the charges against Zamvil were dismissed on October 11, 2007.

On May 9, 2008, Zamvil filed his petition for writ of mandate and complaint for declaratory relief challenging the School District's alleged failure to provide him procedural due process before placing him on compulsory unpaid leave. On October 3, 2008, a hearing on Zamvil's petition was heard, after which the trial court issued an order

denying the petition without prejudice pending the outcome of his upcoming administrative hearing before the Commission.

On December 18, 2008, the Commission issued its final decision to terminate Zamvil's employment for reasons of professional incompetence. The trial court then permitted Zamvil to refile his petition, which he did on January 21, 2010.

On December 21, 2010, following a contested hearing, the trial court denied Zamvil's renewed petition with prejudice and ordered judgment entered in favor of the School District. This timely appeal followed.

### **DISCUSSION**

Under Code of Civil Procedure section 1085, a trial court may issue a writ of mandate to compel an act which the law specifically requires. "A petitioner seeking a writ of mandate under this section is required to show the existence of two elements: a clear, present and usually ministerial duty upon the part of the respondent, and a clear, present and beneficial right belonging to the petitioner in the performance of that duty." (*Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 21-22.)

Where, as here, the relevant facts are undisputed and the petitioner alleges the existence of a duty on the part of the respondent "arising out of statute and/or constitutional guaranty, th[e] court must engage in de novo review of the trial court's refusal to issue the writ. [Citation]." (*Bergeron v. Department of Health Services, supra*, 71 Cal.App.4th at pp. 21-22; *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1217; *County of Sonoma v. Com'n on State Mandates* (2000) 84 Cal.App.4th 1264, 1278-1279.)

Specifically, in this case, Zamvil contends the School District had a duty, which it failed to discharge, to provide him procedural due process before placing him on compulsory unpaid leave. This due process, according to Zamvil, should have included a predisciplinary hearing consistent with the holding of *Skelly v. State Personnel Bd.*

(1975) 15 Cal.3d 194 (*Skelly*).<sup>3</sup> As such, Zamvil seeks both a judicial declaration of his due process rights and an order compelling the School District to reinstate him to paid status with retirement benefits from the date he was suspended without pay until the date he was dismissed (to wit, from May 18, 2006 until December 18, 2008).<sup>4</sup>

The School District responds that Zamvil was not entitled to a *Skelly* hearing before being placed on compulsory unpaid leave because the statutory scheme pursuant to which the School District acted includes procedures sufficient to satisfy due process. Accordingly, the School District denies Zamvil is entitled to any monetary or declaratory relief. In addition, the School District contends the trial court properly denied Zamvil's writ petition because he had an adequate remedy at law in the form of a civil suit for contract and tort damages, and because he failed to submit the requisite government claim before filing his petition.

In considering the parties' opposing views, we first note our agreement with the School District's point that "the extraordinary remedy of mandate is not available when other remedies at law are adequate. [Citations.]" (*Pomona Police Officers' Assn v. City of Pomona* (1997) 58 Cal.App.4th 578, 590.) "In proceedings involving claims for wages by municipal employees or by parties to a contract with a municipality, it is generally held that an ordinary action at law for damages is adequate, and a writ of mandate will be denied. [Citation.] As this court has pointed out, '[i]t is settled that mandamus does not lie when there is no cause of action for reinstatement to a position, but merely a claim for damages for breach of contract.' [Citation.]" (*Ibid.*) The trial court relied upon these well-established principles to deny Zamvil's petition.

---

<sup>3</sup> In *Skelly*, the court held that, before taking punitive action against a permanent employee, the employer must provide certain "preremoval safeguards," including "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly, supra*, 15 Cal.3d at p. 215.)

<sup>4</sup> As mentioned above, Zamvil does not challenge the lawfulness of his permanent dismissal.

However, as Zamvil argues, in “a few situations involving claims by state or municipal employees for wages the general rule has been relaxed. For the most part, these cases concern disputes as to the proper construction of a statute or ordinance defining or giving rise to the exercise of official duty, and, although recognizing that the ultimate effect of a decision may be to adjudicate a money claim, they emphasize the necessity of official cooperation and the ministerial nature of the official acts involved.’ (Tevis v. City & County of San Francisco (1954) 43 Cal.2d 190, 198 [272 P.2d 757].)” (Pomona Police Officers’ Assn v. City of Pomona, *supra*, 58 Cal.App.4th at p. 590.)

In any event, we need not decide for purposes of this appeal whether Zamvil’s petition comes within this more relaxed rule for allowing relief by writ of mandate because, regardless of how his claim is crafted, it fails on the merits. Quite simply, California law, whether of constitutional or statutory origin, imposed no duty on the School District to provide Zamvil a full hearing before placing him on unpaid compulsory leave pursuant to section 44940. In explaining this conclusion, we begin with what California law did require of the School District in Zamvil’s case.

**A. Did Zamvil have a property right in his continued employment?**

Under California law, an individual employed in the public sector who has attained the status of “permanent employee” has “a property interest in the continuation of his [or her] employment which is protected by due process.” (*Skelly, supra*, 15 Cal.3d at pp. 206-207.) That property interest extends to public school teachers, like Zamvil, who are permanent and certificated. (*Turner v. Board of Trustees* (1976) 16 Cal.3d 818, 825.) Accordingly, before the School District could deprive Zamvil of his property interest in continued employment by punitive action, whether by suspension or dismissal, it indeed had to comply with the requirements of procedural due process. (*Ibid.*; *see also Skelly, supra*, 15 Cal.3d at p. 208; *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 110 [recognizing that even mere suspension of a public employee’s right

to continued employment may amount to a taking for due process purposes], citing *Civil Service Assn. v. City & County of San Francisco* (1978) 22 Cal.3d 552, 560.)<sup>5</sup>

However, recognizing Zamvil had a property interest in his continued employment subject to due process protection is just the beginning of our inquiry. We also must decide what process was due and whether Zamvil received it, matters grounded in federal law rather than state law. (*Bostean, supra*, 63 Cal.App.4th at p. 112.) To these matters, we now turn.

**B. Were Zamvil’s due process rights respected?**

Under federal law, “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.” (*Civil Service Assn., supra*, 22 Cal.3d at p. 561, quoting *Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) Generally, it requires that an individual be afforded notice and an opportunity for a hearing before being deprived of a property interest so as to ensure reasonable grounds exist to support the deprivation. (*Bostean, supra*, 63 Cal.App.4th at pp. 112-113, citing *Gilbert v. Homar* (1997) 520 U.S. 924, 933.) Under limited circumstances, however, postdeprivation process may satisfy due process “ ‘where a State must act quickly, or where it would be impractical to provide predeprivation process.’ ” (*Bostean, supra*, 63 Cal.App.4th at p. 112, quoting *Gilbert v. Homar* (1997) 520 U.S. 924, 930 [*Gilbert*].) “ ‘An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.’ ”<sup>6</sup> (*Ibid.*, quoting *Gilbert, supra*, 520 U.S. at pp. 930-31.)

---

<sup>5</sup> The Fourteenth Amendment “ ‘places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of ‘property’ within the meaning of the Due Process Clause.’ ” (*Bostean, supra*, 63 Cal.App.4th at p. 108, quoting *Coleman v. Department of Personnel Admin.* (1991) 52 Cal.3d 1102, 1112.) Property interests are not created by the Constitution, but “are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” (*Id.* at p. 109.)

<sup>6</sup> To determine in a particular case what process is required by the Fourteenth Amendment “ ‘we have generally balanced three distinct factors: [¶] ‘First, the private

The School District contends this case falls into the limited category of cases requiring immediate action to protect an important State interest that justifies postponing a hearing until after the initial deprivation. (See *Bostean, supra*, 63 Cal.App.4th at p. 113, quoting *Gilbert, supra*, 520 U.S. at pp. 930-31.) Indeed, the very statute relied upon as authority for Zamvil’s suspension was enacted for the purpose of permitting swift action against teachers who commit certain criminal offenses that are indicative of an inability to competently supervise children. For reasons to follow, we agree.

The School District’s decision to suspend Zamvil immediately and without pay was pursuant to section 44940. Under this statute, whenever a certificated employee of a school district is “charged with an optional leave of absence offense” as defined in subdivision (b), the governing board of the school district may immediately place the employee upon compulsory leave in accordance with the procedures set forth in this section and section 44940.5. The phrase, “charged with an optional leave of absence offense,” means “charge[d] by complaint, information, or indictment filed in a court of competent jurisdiction with the commission of any controlled substance offense as defined in section 44011 or 87011 . . . .” (§ 44940, subd. (b).)

Here, Zamvil, a certificated teacher, was charged with a controlled substance offense within the meaning of section 44011 – to wit, he was charged in court with possessing approximately 1.53 grams of methamphetamine, a violation of Health & Safety Code section 11377, subdivision (a). (§ 44011, subd. (a); § 44940, subd. (b).) Thus, under section 44940, the School District clearly had discretion to immediately place him on compulsory leave so long as it was in accordance with the procedures in sections 44940 and section 44940.5, which procedures include the following:

---

interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest.’ ” *Mathews v. Eldridge* (1976) 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 . . . .’ ” (*Bostean, supra*, 63 Cal.App.4th at p. 113, quoting *Gilbert, supra*, 520 U.S. at pp. 930-931.)



- Compulsory leave cannot exceed in duration a date more than 10 days after the date of entry of the judgment in the underlying criminal proceedings unless notice is given to the employee within 10 days after entry of the judgment that, unless he demands a hearing, he will be dismissed at the expiration of 30 days from the date of service of the notice. (§ 44940.5, subd. (b); § 44940, subd. (e)(2).)<sup>7</sup>
- The employee will continue to be paid regular salary during the compulsory leave period if he provides a bond or other acceptable security as a guarantee to the

---

<sup>7</sup> Section 44940.5 reads as follows:

“(a) The governing board of the school district may extend the compulsory leave of absence of the employee beyond the initial period specified in Section 44940 or 45304, whichever is applicable, by giving notice to the employee within 10 days after the entry of judgment in the proceedings that the employee will be dismissed at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article.

“(b) An employee placed upon compulsory leave of absence pursuant to this section shall continue to be paid his or her regular salary during the period of his or her compulsory leave of absence if and during that time he or she furnishes to the school district a suitable bond, or other security acceptable to the governing board, as a guarantee that the employee will repay to the school district the amount of salary so paid to him or her during the period of the compulsory leave of absence in case the employee is convicted of the charges, or fails or refuses to return to service following an acquittal of the offense or dismissal of the charges. If the employee is acquitted of the offense, or the charges against the employee are dismissed, the school district shall reimburse the employee for the cost of the bond upon his or her return to service in the school district.

“(c) If the employee does not elect to furnish bond, or other security acceptable to the governing board of the district, and if the employee is acquitted of the offense, or the charges against him or her are dismissed without his or her guilt being established, the school district shall pay to the employee his or her full compensation for the period of the compulsory leave of absence upon his or her return to service in the school district. If the charges against the employee are dismissed as a result of the employee’s successful completion of a drug diversion program, upon the employee’s return to service in the school district, the school district, at the employee’s election, shall pay to the employee any accrued leave, and differential pay pursuant to Sections 44977, 45195, and 45196, for up to the length of the employee’s compulsory leave of absence.

“(d) An action taken pursuant to this section by a governing board shall be reported immediately to the Commission on Teacher Credentialing. The commission shall give priority to the investigation and resolution of these cases.” (§ 44940.5.)

school district that any salary received during this time will be repaid if he is ultimately convicted of the charges or fails or refuses to return to service after acquittal or dismissal of the charges. (§ 44940.5, subd. (b).)

- If no such bond or security is provided and the employee is ultimately acquitted of the offense or the charges against him are dismissed without guilt being established, the school district must fully compensate him for the leave period once he returns to service. (§ 44940.5, subd. (c).)
- If no such bond or security is provided and the charges are dismissed as a result of the employee's successful completion of a drug diversion program, the employee may elect *upon his return to service* to have the school district pay him accrued leave and differential pay pursuant to sections 44977, 45195, and 45196, for up to the length of the compulsory leave period. (§ 44940.5, subd. (c); italics added.)
- The school district must forward a copy of the criminal complaint to the Commission on Teacher Credentialing within 10 days of receiving it, and the Commission must then automatically suspend the employee's teaching or service credential. (§ 44940, subd. (e).)

The School District's actions in suspending Zamvil were fully consistent with these Education Code procedures. In particular, as the record reflects, the School District notified Zamvil by letter on May 18, 2006 that he was being placed on compulsory unpaid leave pursuant to section 44940 based on the felony criminal complaint filed against him for violating Health & Safety Code section 11377, subdivision (a) and Penal Code section 148. (§ 44940, subd. (b), (e).) This letter advised Zamvil that his compulsory leave would be effective immediately and continue until 10 days after entry of the final judgment in his criminal case, at which time he had three days to notify the Assistant Superintendent of Human Resources of the entry of judgment. (§ 44940, subd. (e).) The letter also instructed Zamvil that he would continue to receive full salary during the leave period only if he provided a suitable bond, and that, if he were to be acquitted of the charges, he would be reimbursed for the cost of the bond upon his return to service. (§ 44940.5, subds. (b), (c).) Finally, the letter advised Zamvil of the School District's

obligation to notify the Commission on Credentialing of his placement on compulsory leave based upon the charges in the criminal complaint (§ 44940.5, subd. (d)), and enclosed copies of sections 44011, 44940, and 44940.5 for his information.<sup>8</sup>

After receiving this letter, Zamvil neither posted the mandatory bond to continue receiving full salary nor provided the mandatory notice of entry of judgment in his criminal case. As such, consistent with the procedures set forth above, Zamvil remained on compulsory leave without pay until such time as the Commission, following a full hearing, issued its final decision to terminate his employment on December 18, 2008.

Putting aside this undisputed record of Zamvil's noncompliance with the procedural dictates of section 44940, Zamvil does not directly challenge the *statute's* compliance with the dictates of due process. In any event, we conclude these Education Code procedures provided Zamvil all the due process to which he was entitled. As Zamvil's own authority recognizes: "The purpose of any presuspension hearing would be to assure that there are reasonable grounds to support the suspension without pay." (*Bostean, supra*, 63 Cal.App.4th at p. 113.) Here, the School District, acting under the authority of section 44940, had this assurance in light of the felony criminal complaint charging him with violating Health & Safety Code section 11377, subdivision (a).

Indeed, the United States Supreme Court has recognized this type of assurance goes far to ensure the deprivation suffered by an individual is not baseless or unwarranted. In *Gilbert v. Homar*, a police officer employed by a public university was immediately suspended after being charged with felony drug possession. After balancing the relevant factors, the highest court found no due process violation. In doing so, the court deemed most significant the fact that the criminal procedures of arrest and formal

---

<sup>8</sup> As discussed earlier, the letter superseded a May 11, 2006 letter notifying Zamvil that the School District intended to dismiss him from service for reasons set forth in an accompanying Statement of Charges unless he filed a written request for hearing within 30 days (which he did on June 9, 2006.) This earlier letter was drafted before the School District discovered the felony criminal complaint charging Zamvil with drug possession and resisting arrest and did not purport to immediately impose compulsory unpaid leave pursuant to section 44940.

charge by complaint “serve to assure that the state employer’s decision to suspend the employee is not ‘baseless or unwarranted,’ . . . in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime.” (*Gilbert v. Homar, supra*, 520 U.S. at p. 934.) In addition, the court relied on the State’s significant interest in “immediately suspending when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility . . . .” (*Gilbert v. Homar, supra*, 520 U.S. at p. 932. Cf. *Bostean, supra*, 63 Cal.App.4th at p. 117 [suspension without pay violated public employee’s due process rights where there was no “collateral or related proceeding in which [he] was involved which could have assured his supervisors that the decision to place him on involuntary illness leave was medically warranted” or right to be made whole monetarily if successful in a postdeprivation hearing].) We believe these same factors weigh in favor of the School District in this case.

Thus, having found no constitutional or statutory requirement that the School District conduct a predeprivation hearing before placing Zamvil on compulsory unpaid leave pursuant to section 44940, we conclude his petition for writ of mandate was properly denied. Simply put, there is no clear duty on behalf of the School District to be mandated in this case.<sup>9</sup>

### **DISPOSITION**

The judgment is affirmed. Costs on appeal are awarded to respondents.

---

<sup>9</sup> Zamvil makes one additional argument. He claims the School District violated the Brown Act, Government Code section 44957, by failing to provide him written notice that the administrative charges against him would be heard by the Board of Trustees or School Administrator. However, as the School District points out, the Commission addressed this exact issue at Zamvil’s termination hearing and ultimately decided it lacked merit. Zamvil has not appealed from the Commission’s decision and, as he admits, it is now final. As such, our consideration of the issue herein would be improper. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867 [“It is settled that the doctrine of collateral estoppel or issue preclusion is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity”].)

---

Jenkins, J.

We concur:

---

McGuiness, P. J.

---

Siggins, J.